Supreme Court, U.S.
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No. 03-28

IN THE

Supreme Court of the United States

CECIL R. ARNOLD,

Petitioner,

v.

RAYONIER INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals properly affirmed the district court's judgment in favor of the Respondent on the basis that:

1) All of the Petitioner's hiring claims, save one, were time-barred, in that Petitioner failed to file a timely administrative charge following the Respondent's rejection of each of his applications, and no continuing violation occurred that would revive the time-barred claims;

2) On the sole hiring claim that was not time-barred, Petitioner's application for the 2001 position, he failed to make a *prima facie* case in that Respondent made a bona fide business decision not to permanently fill the position and was not continuing to seek applicants for the position;

3) Even if Petitioner had made a *prima facie* case, Respondent proffered a legitimate nondiscriminatory reason for not hiring him and Petitioner failed to present sufficient evidence that the reason was a pretext; and

4) Petitioner failed to show that Respondent's refusal to hire him was in retaliation for his having filed an earlier lawsuit against Respondent in that the decision not to hire Petitioner was sufficiently remote in time from the earlier lawsuit so as to refute any causal connection.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Rayonier Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Summary of the Argument	7
Reasons for Denying the Petition	9
I. Petitioner Failed To Prove A Continuing Violation So As To Revive His Time-Barred Claims.	9
II. Rayonier Had A Legitimate Business Reason To Limit Its Consideration To Current Employees For The Vacancies For Which The Petitioner Applied.	11
III. Petitioner Failed To Establish A *Prima Facie* Case Of Age Discrimination With Respect To The Machines/Finishing Shift Supervisor Position.	12
IV. Petitioner Failed to Prove that Rayonier's Decision Regarding the January 2001 Position Was in Retaliation For His Earlier Lawsuit.	14
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Balletti v. Sun-Sentinel Co., 909 F. Supp. 1539 (S.D. Fla. 1995) 15-16

Conner v. Schnuck Markets, Inc., 121 F.3d 1390 (10th Cir. 1997) 15, 16

Culley v. Trak Microwave Corp., 117 F. Supp. 2d 1317 (M.D. Fla. 2000) 14, 15

EEOC v. Joe's Stone Crabs, 296 F.3d 1265 (11th Cir. 2002) 10

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9

Grayson v. K Mart Corp., 79 F.3d 1086 (11th Cir. 1996) 10

Harper v. Blockbuster Entm't. Corp., 139 F.3d 1385 (11th Cir. 1998) 14

Hudson v. Norfolk Southern Ry. Co., 209 F. Supp. 2d 1301 (N.D. Ga. 2001) 15

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 12, 13

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 10

Cited Authorities

	Page
Nealon v. Stone, 958 F.2d 584 (4th Cir. 1992)	9
Nida v. Echols., 31 F. Supp. 2d 1358 (N.D. Ga. 1998)	10
Pollocks v. Sunland Training Ctr., 85 F. Supp. 2d 1236 (N.D. Fla. 2000)	11
Richmond v. ONEOK, Inc., 120 F.3d (10th Cir. 1997)	16
Wascura v. City of S. Miami, 257 F.3d 1238 (11th Cir. 2001)	16
West v. Russell Corp., 868 F. Supp. 313 (M.D. Ala. 1994)	11
Statutes:	
29 U.S.C. § 621, *et seq.*	6
29 U.S.C. § 626(d)(1)	9
42 U.S.C. § 2000e, *et seq.*	6
Rule:	
U.S. Sup. Ct. R. 15.2	1

STATEMENT OF THE CASE

This case arises out of allegations made by the Petitioner, Cecil R. Arnold, ("Petitioner") that the Respondent, Rayonier Inc., ("Respondent" or "Rayonier") discriminated against him based on his age and in retaliation for a previous lawsuit he filed.[1]

Rayonier is a forest products company principally involved in the manufacture of performance fibers and lumber, the management of timberlands and the international marketing of wood products. Petitioner was hired as an hourly employee on June 23, 1969, to work in the Finishing Department at Rayonier's pulp mill in Jesup, Georgia (the "Mill"). Petitioner worked in the Finishing Department at the Mill throughout his tenure (except for two weeks he worked in the Woodyard in 1969 or 1970). Petitioner was promoted in 1976 to a salaried, exempt position as a Finishing Room Foreman. Petitioner worked in that position until his employment was terminated on September 9, 1996, when his position was eliminated as part of an economic reduction in force.

Petitioner, who was forty-six years of age, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that his employment was terminated due to his age. He subsequently filed a lawsuit against Rayonier that proceeded to trial in June 1998. The jury returned a verdict in favor of Rayonier, Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed the verdict ending the case. *See* Pet. App. at 5a.

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1. Rayonier has provided a thorough Statement of the Case pursuant to Rule 15.2, Rules of the Supreme Court of the United States, because Petitioner's statement is not accurate.

Following the conclusion of that lawsuit, Petitioner applied for five first-level supervisory positions at the Mill. Each of these jobs was only posted internally and Rayonier considered only current employees for the positions. This practice was consistent with Rayonier's normal policy of filling first-line supervisory positions by promoting incumbent hourly employees in order to provide advancement opportunities for those employees. Additionally, this enabled Rayonier to promote individuals within a department who were already familiar with the processes and the employees in that area of the Mill.

The first posted position for which Petitioner applied was Warehouse Area Manager. This job vacancy was posted at the Mill on December 21, 1999. The position was not advertised outside the Mill but Petitioner apparently learned of this vacancy and the others for which he applied because a current employee at the Mill sent him a copy of the posting or orally advised him of it. Petitioner was the only applicant from outside the Mill for this position and for each of the other positions for which he applied.

Petitioner submitted a written application for the Warehouse Area Manager position and also spoke with Jennifer Johnson, the Human Resources Manager ("Johnson"), who advised the Petitioner that he was not eligible to apply for the position because he was not a current employee. Bruce Woodward (DOB: 02/28/54), who was a current employee and who had prior experience working in the Warehouse Department as an hourly employee, an hourly relief supervisor, and as a salaried relief supervisor, was promoted to the Warehouse Area Manager position.

On August 8, 2000, Rayonier posted a Finishing Production Planner position at the Mill directed to internal candidates only. Rayonier posted the position using its standard, pre-printed form for salaried positions, which contained a reference to the Employee Referral Program (HR Practice 4.0) stating that an employee could be awarded $500 for referring an individual for a regular salaried position. However, it is beyond dispute that this statement was included on all postings even when Rayonier was only considering current employees because the pre-printed form, which was used for all job postings, contained that language.

Rather than submitting an application for the Finishing Production Planner position, Petitioner contacted Johnson on August 15, 2000, and was told that he was not eligible to apply for the position because he was not a current employee. During his deposition, Petitioner confirmed that he was not aware of anyone who was not a current employee who was permitted to apply for the position. In fact, there were no other non-employee applicants. Petitioner also testified that, as of August 15, 2000, the date he spoke with Johnson, he understood that he was not going to be considered for the position and he believed Rayonier was discriminating against him. Earl Dent (DOB: 06/22/57), a current hourly employee, was promoted to the Finishing Production Planner position.

On September 1, 2000, Rayonier posted a notice at the Mill that it was seeking to fill a Relief Machines/Finishing Shift Supervisor position. Unlike the earlier positions for which Petitioner applied, this was a relief position. The term relief position refers to Rayonier's use of current, hourly, bargaining unit employees as temporary or relief supervisors. This is a common practice at the Mill and throughout the pulp and paper industry. Petitioner admitted that relief

positions are filled at the Mill by Rayonier's promoting current hourly employees in the same department who then act as supervisors on a temporary basis. Accordingly, there is no question that Rayonier was only seeking applications for the relief position from current hourly employees who were interested in working in the position on a temporary basis as needed.

Even though he realized that Rayonier was only considering current employees for the Relief Machines/ Finishing Shift Supervisor position, Petitioner called Johnson on September 6, 2000, about the job and was told it was a part-time, relief position and he was not eligible because he was not a current employee. Again, Petitioner admitted that he realized when he made the call that he would not be considered for the job, and that he believed at that time that Rayonier's failure to consider him constituted discrimination. Pursuant to its normal practice, Rayonier selected Jerry Frasier (DOB: 11/24/48), an incumbent hourly employee in the Finishing Department who was two years older than Petitioner, for the vacant relief position.

On October 30, 2000, Rayonier posted a vacancy announcement at the Mill for a Warehouse Area Manager position. As with the earlier jobs, this position was not advertised outside the Mill. Petitioner did not submit an application but called Johnson on November 7, 2000, to inquire about the position and was, once again, advised that he was not eligible because he was not a current employee and Rayonier was only considering current employees for the position. Petitioner admitted that as of November 8, 2000, he knew that he was not going to be considered for the position and he believed that, as a result, he was being discriminated against. Rayonier only considered incumbent

employees for the Warehouse Area Manager position and selected Jody Blanton (DOB: 12/09/46), who was four years older than Petitioner.

Rayonier posted a notice for a Machines/Finishing Shift Supervisor position on January 31, 2001. Once again, Rayonier only considered current employees and did not advertise this job outside of the Mill. Petitioner claimed that he sent two applications and also left a message for Johnson on February 6, 2001, but never heard back from her. This was a first-line supervisory position that was vacant because Jody Blanton had moved from this position to the Warehouse Area Manager position. Four current employees applied for the position.

Rayonier interviewed the four current employees and did not consider Petitioner or anyone else from outside the Mill. Following the interviews, Rayonier decided that none of the four applicants fully met its criteria for the salaried position. Therefore, rather than promoting someone who might not succeed, Rayonier decided to indefinitely delay permanently promoting anyone to the position. Rayonier decided, instead, to fill the position by temporarily promoting hourly employees to the position until it decided to permanently fill the position. The incumbent hourly employees who had been temporarily promoted to work in this job at the time when Rayonier filed its motion for summary judgment were: Gary Blanton (DOB: 08/15/61); Al Copeland (DOB: 01/25/60); Jerry Frasier (DOB: 11/24/48); Jay Jacobs (DOB: 09/26/66); William Milledge (DOB: 03/31/47); Robby Poppell (DOB: 08/16/61); Tony Batten (DOB: 04/23/49); and Keith Vanderveen (DOB: 11/05/66). Three of these individuals were older than Petitioner (DOB: 05/11/50).

On July 5, 2001, Petitioner filed a charge of discrimination with the EEOC. In response, the EEOC, without investigating the charge, issued a dismissal and a notice of a right-to-sue. Petitioner then filed his Complaint in the district court. In the Complaint, Petitioner alleged that he had applied for numerous positions with Rayonier since September 9, 1996, but was repeatedly denied employment due to his age and in retaliation for having earlier filed a lawsuit against Rayonier. Petitioner claimed that Rayonier's conduct violated both the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The Title VII claim was dismissed by the district court early in the case and Petitioner did not appeal that Order. Accordingly, the Title VII claim is not discussed in this Response.

On May 10, 2002, Rayonier filed a motion for summary judgment seeking to dismiss Petitioner's ADEA claims. On June 26, 2002, the district court granted the motion ruling that Petitioner had failed to comply with the administrative prerequisites necessary to file a suit under the ADEA with regard to four of the alleged failures by Rayonier to offer him a position in that he did not file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory actions. Accordingly, the court ruled that only the January 2001 failure to hire claim survived. The court further determined that Petitioner had failed to make a *prima facie* showing of discriminatory failure to hire with respect to that position because he had not shown that it was filled by a substantially younger individual since Rayonier had chosen not to permanently fill the position.

Petitioner appealed the district court's order and the Eleventh Circuit Court of Appeals affirmed. In doing so, the court of appeals concluded that all of Petitioner's claims, except for the claim for the January 2001 position, were barred and ruled that there was no continuing violation. The court of appeals also decided that, since Rayonier did not permanently fill the January 2001 position nor did it continue to seek applicants for that position, Petitioner had failed to establish a *prima facie* case of age discrimination. In addition, the court of appeals ruled that even if Petitioner had made a *prima facie* showing, Rayonier had provided a legitimate and nondiscriminatory reason for refusing to consider him. Finally, the court of appeals ruled that Petitioner's retaliation claim also lacked merit in that the time that had elapsed between the end of Petitioner's earlier lawsuit and Rayonier's decision not to consider him for a job vacancy negated any causal connection between those events.

Petitioner then filed a timely Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Rayonier submits that the district court properly granted summary judgment in its favor and the court of appeals correctly affirmed that decision. Both courts correctly applied well settled principles of law to clearly-established facts. No further appellate review is warranted and this Court should, therefore, deny the Petitioner's Petition for Writ of Certiorari.

The court of appeals correctly concluded that Petitioner's claims related to the four positions for which he submitted

applications prior to 2001 were untimely because Petitioner failed to file a charge with the EEOC within 180 days after he understood that Rayonier was not going to consider him for the positions and believed that the decision constituted unlawful discrimination. In so ruling, the court of appeals correctly rejected Petitioner's argument that Rayonier's refusals to hire him constituted a continuing violation.

With regard to the January 2001 position for which Petitioner made a timely claim, the court of appeals properly concluded that Petitioner failed to establish a *prima facie* case of age discrimination because Rayonier did not permanently fill the position and did not continue seeking applicants. Even if Petitioner had established a *prima facie* case, the court of appeals ruled that Rayonier established a legitimate and nondiscriminatory reason for not hiring him. Specifically, the court ruled that Rayonier established that it had a legitimate business reason that was not related to age to limit its consideration for that position to current employees and Petitioner failed to show that Rayonier's reason was a pretext for age discrimination. Finally, the court of appeals correctly ruled that Petitioner's retaliation claim was properly dismissed by the district court in that, because of the length of time between the Petitioner's earlier lawsuit and Rayonier's rejection of his 2001 application, Petitioner did not establish a causal connection necessary to support a retaliation claim.

REASONS FOR DENYING THE PETITION

I. Petitioner Failed To Prove A Continuing Violation So As To Revive His Time-Barred Claims.

Although Petitioner has not raised a continuing violation argument as a separate issue in the Petition, he does contend in his Statement of the Case that this Court should consider the fact that he applied for and was rejected for five positions as establishing a pattern or continuing act of discrimination by Rayonier. Accordingly, Rayonier will address this as a separate issue.

In essence, Petitioner argues that the continuing violation doctrine should apply to revive his time-barred claims. His argument is not well taken for two reasons. First, Petitioner failed to raise this issue before the district court. He has, therefore, waived this argument and can not now raise it. *See Nealon v. Stone,* 958 F.2d 584, 590 n.4 (4th Cir. 1992). Moreover, well-established Supreme Court decisions and the court of appeals decision in this case make it clear that there was no continuing violation.

It is well settled that in order to pursue a judicial remedy for an alleged violation of the ADEA in a non-deferral state, a plaintiff must have filed a charge of discrimination with the EEOC within 180 days from the time the alleged unlawful practice occurred. *See* 29 U.S.C. § 626(d)(1); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (to maintain suit under the ADEA, plaintiff must first file EEOC charge). Georgia is a "non-deferral state" in that it has no state law banning age discrimination in employment nor does it have a state entity authorized to grant or to seek relief for victims of such discrimination.

Grayson v. K Mart Corp., 79 F.3d 1086, 1100 n.21 (11th Cir. 1996). Therefore, a plaintiff in Georgia must file a charge with the EEOC within 180 days of the alleged discriminatory act. Failure to do so bars the claimant from pursuing a civil action for that claim. *See Nida v. Echols*, 31 F. Supp. 2d 1358, 1365 n.8 (N.D. Ga. 1998).

Because Petitioner did not file an EEOC charge until July 5, 2001, anything that occurred prior to January 6, 2001, could not be considered by the district court. The result was that the only job for which Petitioner applied that could be used as a basis for his claim was the Machines/Finishing Shift Supervisor position for which he applied in January 2001.

Accordingly, the district court and the court of appeals correctly precluded Petitioner's pre-2001 claims as untimely. In addition, the court of appeals noted that discrete acts or one-time employment events are not subject to the continuing violation doctrine. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). In *Morgan*, this Court ruled: "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" are not actionable if time-barred, even when they are related to acts alleged in timely filed charges, thereby eliminating application of the continuing violation doctrine to claims involving discrete acts. *Id.* In *EEOC v. Joe's Stone Crabs*, the Eleventh Circuit Court of Appeals adopted *Morgan* ruling that failure to hire claims "were discrete, one-time employment events that should have put the claimants on notice that a cause of action had accrued." 296 F.3d 1265, 1272 (11th Cir. 2002).

The decision of the court of appeals in this case, as well as Supreme Court and existing Eleventh Circuit case law,

lead to the clear conclusion that each of Petitioner's failure to hire claims was a separate, distinct act that should have put Petitioner on notice or alerted him to the fact that he was being discriminated against. Moreover, each of these separate events triggered Petitioner's obligation to file a claim with the EEOC. In fact, Petitioner admitted during his deposition that each time Johnson, as a representative of Rayonier, advised him that he would not be considered for the position, he believed that he was being discriminated against by Rayonier. Clearly, once the Petitioner knew he had been rejected and expressed a belief that this was a violation of his rights, his legal duty to file a charge regarding that position arose. His failure to do so within 180 days resulted in those claims being barred. Accordingly, the district court properly rejected the application of the continuing violation theory in this case and the court of appeals correctly affirmed that conclusion.

II. Rayonier Had A Legitimate Business Reason To Limit Its Consideration To Current Employees For The Vacancies For Which The Petitioner Applied.

Petitioner argues that Rayonier violated his rights under the ADEA by limiting its consideration for the positions for which he applied to current employees. However, numerous courts disagree and have found an employer's preference for internal candidates is a legitimate, nondiscriminatory reason. *See West v. Russell Corp.*, 868 F. Supp. 313, 318 (M.D. Ala. 1994) (noting that employers giving extra consideration to a candidate due to his status as a current employee is "clearly a legitimate basis for an employer to make such a decision"); *Pollocks v. Sunland Training Ctr.*, 85 F. Supp. 2d 1236, 1248-49 (N.D. Fla. 2000) (noting that an employer giving preference to current employees would constitute a legitimate, nondiscriminatory reason and finding that such a

reason was not pretextual as it was an "objectively verifiable preference[]"). Accordingly, it is clear that Rayonier's preference for current employees was not a violation of the law; rather, it was a legitimate business decision based on reasons clearly not related to age or Petitioner's earlier lawsuit against Rayonier.

The fact that Petitioner was the only applicant for these positions who was not a current employee does not alter this conclusion. Rayonier's having limited its consideration to current employees was clearly not an attempt to avoid hiring applicants over the age of forty. In fact, two of the current employees that Rayonier permanently selected for the five positions for which Petitioner applied were older than Petitioner. Additionally, three of the incumbent hourly employees who were used to temporarily fill the January 2001 position were older than Petitioner. Accordingly, the decision of the district court as affirmed by the court of appeals that Rayonier did not violate Petitioner's rights when it limited those it considered for the positions to current employees was clearly consistent with the law and should not be overturned.

III. Petitioner Failed To Establish A *Prima Facie* Case Of Age Discrimination With Respect To The Machines/Finishing Shift Supervisor Position.

Petitioner relies primarily on *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to argue that it is not necessary that a vacant position be filled by a younger individual in order to establish a *prima facie* case of discrimination. Indeed, Petitioner argues that a plaintiff may show either that someone outside the protected class, meaning, in this case, someone significantly younger than Petitioner, was hired or

that the employer left the position open and continued seeking "applicants from persons of complainant's qualifications." *Id.* at 802.

In this case, however, for the only position for which Petitioner applied where his claim was not time-barred, the January 2001 Machines/Finishing Shift Supervisor position, Rayonier did not permanently fill the position and did not continue to seek applicants. Rather, it began using current hourly employees to "set-up" into the vacant position on a temporary basis. Rayonier presented evidence that this was consistent with its long-standing, legitimate business practice. Additionally, in this case, current employees who were both older and younger than Petitioner were used by Rayonier to fill the temporary position. Therefore, it is clear that no inference of age discrimination could be drawn.

In addition, even assuming that Rayonier continued to attempt to permanently fill the Machines/Finishing Shift Supervisor position, Petitioner presented no evidence establishing that Rayonier was seeking "persons of complainant's qualifications." *Id.* Instead, the undisputed evidence shows that Rayonier limited its consideration to current employees; since Petitioner was not a current employee, he was not qualified for the position. Accordingly, Petitioner clearly failed to satisfy the fourth element of a *prima facie* case under *McDonnell Douglas* in that he failed to show that Rayonier continued seeking applications from candidates with the same qualifications as Petitioner. Although he never directly argues the point, the Petitioner appears to be contending that, because he had previously worked at the Mill, he should have been considered by Rayonier as though he were a current employee when the selections were made. However, there is no legal authority

for this proposition, and, therefore, it was properly not considered by either the district court or the court of appeals.

In sum, it is evident that Petitioner failed to make a *prima facie* case of discriminatory failure to hire with respect to the Machines/Finishing Shift Supervisor position. As a result, the district court's ruling granting Rayonier's motion for summary judgment was correctly affirmed by the court of appeals.

IV. Petitioner Failed to Prove that Rayonier's Decision Regarding the January 2001 Position Was in Retaliation For His Earlier Lawsuit.

In order to show a *prima facie* case of retaliatory failure to hire, Petitioner must have shown that: (1) he had engaged in statutorily protected activity; (2) Rayonier had subjected him to an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse action. *See Culley v. Trak Microwave Corp.*, 117 F. Supp. 2d 1317, 1321-22 (M.D. Fla. 2000) (citing *Harper v. Blockbuster Entm't. Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998)).

In this case, Petitioner did not make a sufficient showing to satisfy either the second or third elements of the *prima facie* case for retaliation. With respect to the only claim that was not time-barred, Petitioner's claim that he should have been hired for the January 2001 Machines/Finishing Shift Supervisor position, Petitioner clearly did not show that he was subjected to an adverse employment action. Rayonier did not hire anyone for that position nor did it continue seeking applicants for the position. Accordingly, Petitioner could not show that Rayonier's failure to hire him constituted

an adverse employment action. *See Culley,* 117 F. Supp. 2d at 1322 ("Because Trak did not hire anyone for the [position at issue], Culley cannot establish that Trak's failure to hire *him* constitutes an 'adverse employment action.'"). Therefore, Petitioner clearly did not show that he suffered an adverse employment action sufficient to make a *prima facie* showing of retaliatory failure to hire.

Even assuming that Rayonier's decision not to fill the 2001 position constituted an adverse employment action, Petitioner did not satisfy the final element of the *prima facie* case by showing a causal connection between his protected activity and the failure to hire him. As the court of appeals concluded in affirming the district court's Order granting Rayonier's motion for summary judgment:

> Almost 18 months elapsed between Arnold's last 'protected activity' (in this case his appeal of the 1997 discriminatory discharge case to this Court on July 1, 1998), and the first allegedly discriminatory refusal to hire on December 30, 1999. Other than his temporal argument, Arnold pointed to no other evidence showing a causal connection between Rayonier's refusals to hire him and his protected activity.

Pet. App. at 5a; *see Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1339 (N.D. Ga. 2001) ("A seven-month, or even five-month lapse of time is too lengthy to support an inference of cause-and-effect by itself.") (citing *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997)) ("four-month gap between protected activity and termination not sufficient to justify an inference of causation."); *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539, 1548 (S.D.

Fla. 1995) (plaintiff's internal complaint followed six months later by her termination, "was not temporally close enough to support an inference of causal connection.").

The court of appeals also adopted similar reasoning in an earlier case, *Wascura v. City of South Miami,* 257 F.3d 1238, 1244-45 (11th Cir. 2001), where it examined the issue of causal connection at the pretext stage and noted:

> While a close temporal proximity between two events may support a finding of a causal connection between those two events, the three and one-half month period between Wascura's notification to the Commissioners of her son's illness and her subsequent termination does not, standing alone, show that the City's articulated reasons for her termination were pretextual.

Wascura, 257 F.3d at 1244-45 (internal citations omitted) (citing *Conner,* 121 F.3d at 1395 (four-month lag insufficient to show causal connection)); *Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (10th Cir. 1997) (three month lag, standing alone, is not sufficient to establish causal connection).

Clearly, Petitioner, in this case, failed to establish a *prima facie* showing of a retaliatory failure to hire and, accordingly, the court of appeals affirmation of the district court's Order granting Rayonier's motion for summary judgment on Petitioner's retaliation claim should be permitted to stand by this Court.

CONCLUSION

For the foregoing reasons, Rayonier respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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